

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Jenkins v. Jenkins, 2008 NSSC 301

Date: 20081009

Docket: S.P. No. 1205-002700; SPD 052885

Registry: Pictou

Between:

JACKLYN GISELE JENKINS

Petitioner

and

GORDON DAVID JENKINS

Respondent

Judge:

Chief Justice Joseph P. Kennedy

Heard:

May 9th, 2008, in Pictou, Nova Scotia

Decision:

October 9th, 2008

Counsel:

Roseanne M. Skoke for the Petitioner
Nicole J. Mahoney for the Respondent

By the Court:

[1] This is a divorce proceeding that was originally before Justice Scanlan of this Court on February 22nd, 2008.

[2] At that time he determined the issues of custody and access, however, due to the unavailability of court time the issues of spousal support and property division were severed with consent of the parties.

[3] The matter came before me on May 9th, 2008 to address these remaining issues.

BACKGROUND:

Facts

[4] Jacklyn Gisele Jenkins and Gordon David Jenkins were married on the 26th day of July, 1986, in New Glasgow, Nova Scotia and separated on the 15th day of December, 2005. There are two children of the marriage, Ashley Louise Jenkins, born July 29th, 1990 and Agnes Louise Jenkins, born September 17th, 1992.

[5] Although the parties separated in December of 2005, they continued to reside in the matrimonial home until June of 2006 when the wife and children moved out. Since then the children have moved back and forth between the parents' residences; at the date of the hearing the daughter, Ashley, is residing with her father and the daughter, Agnes, is residing with her mother.

[6] Throughout the marriage the husband was employed as a floor installer. He was commonly laid off during the slow periods and his average income was \$30,000.00 - \$35,000.00 a year.

[7] In 2006, the husband underwent heart surgery and was unable to work for several months. He did receive Employment Insurance sick benefits. His income for 2006 was \$30,416.85. Unfortunately, his employer went out of business in June of 2007 and Mr Jenkins is now receiving Employment Insurance benefits and is in the process of starting a new business. He is fifty-eight years of age.

[8] The wife was a "stay-at-home mom" for the first part of the marriage but returned to the workforce in 1997. She is employed as a school bus driver. Her annual income is approximately \$20,840.00. The wife was also a dog breeder, but

there is no reliable evidence before this Court as to income that she may have received from that venture. Her testimony in that respect is that she was “lucky to break even”.

[9] The parties resided on Mr Jenkins’ family farm, which was deeded to him in 1985 by his mother. The property consisted of approximately 60 acres, 9 of which were sold in 2005 to finance home renovations and pay off debts. The matrimonial home and farm buildings sit on five acres of this land and have been appraised for approximately \$93,000.00. The value of the additional acreage is in dispute.

[10] During the marriage, the parties reached an agreement whereby Mr Jenkins paid most of the household expenses. Ms Jenkins paid for the telephone, internet, cable and the insurance on the car and truck. She also paid expenses associated with breeding the dogs.

[11] When the wife left the family home, she took household furniture with her. The husband retained some dishes, his personal belongings, family pictures, the stove, microwave, deep freeze, television, a bed, and the refrigerator, which was the subject of a loan. The wife took the 2003 minivan and Mr Jenkins kept the 1994 truck. The

minivan was subsequently returned to the husband. There is an outstanding loan specific to this vehicle.

[12] The parties attended Family Court on September 25th, 2006 and the husband was ordered to pay child support to Ms Jenkins in the amount of \$453.00 per month and spousal support in the amount of \$240.00 per month, which was the amount of the monthly loan payment for the van.

Current Financial Situation of the Parties

[13] The wife earns \$20,840.00 per year with employment income and Employment Insurance benefits. She has medical coverage through her employer as well as an employment pension.

[14] Although the husband averaged \$30,000.00 - \$35,000.00 per year during the marriage, at the date of the hearing he had income of \$21,996.00 in Employment Insurance benefits. As indicated, he has recently started a flooring installation business, however, there was no financial information relevant to this venture made available to the Court.

[15] Mr Jenkins was removed from the medical plan in November of 2006 and has to pay approximately \$230.00 per month for his heart medications. He does not have an employment pension or medical plan.

[16] The wife believes that he received severance pay upon the termination of his employment, however, there is no evidence before me as to this suggested income.

ISSUES

[17] The issues to be decided in this matter are:

- i) Should the wife receive spousal support?
- ii) Division of property and marital debt

The evidence put forward specific to the income of the parties was commonly less than reliable. I refer to some examples. There is a suggestion that the wife, during the marriage and after separation, received income from her dog breeding operation but

I cannot, on the evidence, so find. The husband was said to have received a severance payment but there is no definitive evidence to support this. The wife claims that the husband now works for cash but does not support that suggestion with evidence. I will try to reach fair conclusions based on the evidence available.

i) Spousal Support

[18] The *Divorce Act* outlines the objectives and relevant considerations in making a spousal support order at s. 15.2:

15.2(1) Spousal support order

A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

15.2(3) Terms and conditions

The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

15.2(4) Factors

In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

...

15.2(6) Objectives of spousal support order

An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[19] In *Bracklow v. Bracklow*, 1999 CanLII 715 (S.C.C.) [1999] 1 S.C.R. 420, McLachlin J. (as she then was), writing for the Court, referred to *Moge v. Moge*, 1992 CanLII 25 (S.C.C.) and summarized the factors that a trial judge examines when determining the issue of spousal support at paragraphs 35-36:

35 *Moge*, ... sets out the method to be followed in determining a support dispute. The starting point is the objectives which the *Divorce Act* stipulates the support order should serve: (1) recognition of economic advantage or disadvantage arising from the marriage or its breakdown; (2) apportionment of the financial burden of child care; (3) relief of economic hardship arising from the breakdown of the marriage, and (4) promotion of the economic self-sufficiency of the spouses: s. 15.2(6). No

single objective is paramount; all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships.

36 Against the background of these objectives the court must consider the factors set out in s. 15.2(4) of the *Divorce Act*. Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse . . . the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party": *Ross v. Ross* (1995), 168 N.B.R. (2d) 147 (C.A.), at p. 156, per Bastarache J.A. (as he then was). There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[20] The parties were married for nineteen years - in today's society that is considered a long marriage.

[21] It is the husband's position that the wife did not suffer any economic disadvantage or hardship arising from the marriage or the breakdown of the marriage. On the contrary, he submits the wife retained most of the household contents and walked away from the matrimonial debts.

[22] He says that the wife did not suffer any negative financial consequences arising from the care of the children of the marriage. During the winter months, the husband was often laid off from his employment and was able to assist with the care of the children.

[23] The wife now has steady, reliable employment with pension benefits. It is the husband's position that she is self-sufficient and has not demonstrated a need for spousal support.

[24] Even had she established a need, the husband says he does not have the ability to pay spousal support. The husband's present income of \$21,996.00 in Employment Insurance benefits, approximates the wife's annual income. The husband recently started a flooring installation business through the assistance of the Self-Employed Benefits (SEB) Program offered by Human Resources and Social Development Canada, which allows a participant to have his Employment Insurance benefits extended for up to one year while he works on starting his business.

[25] He is fifty-eight years old and has had heart problems. The flooring business is strenuous work and there is no guarantee that the husband can perform this work on a full-time basis, even if the demand is present. The wife is fifty-two years old and has no apparent health problems that would affect her ability to work.

[26] The wife speaks to spousal support, pointing out that she earns a meager income and spent much of the marriage looking after the children and out of the workforce.

[27] She says that although unemployed at the date of the hearing, the husband has the ability to generate income. She believes that he is presently working for cash, but provides no details.

[28] The wife submits that the economic disadvantages to her are evident. The wife left the house and property without financial support from Mr Jenkins due to circumstances at the time of separation.

[29] She wants a lump sum payment to address spousal support.

[30] As to spousal support - I do not find on the totality of the evidence that spousal support should be payable at the present time. I have considered the factors set out in *Moge v. Moge, supra*, the circumstances of the parties since the marriage breakdown, and the husband's ability to pay. I conclude that the wife did not suffer any economic disadvantage or hardship arising from the marriage or its breakdown.

[31] The wife has secure income with the school board and she will be receiving a property settlement.

[32] The husband is on Employment Insurance and attempting to start a new business. He has medical issues. The suggestion by the wife that he works for unreported cash is just that, a suggestion. There is no evidence to consider as to that possibility.

[33] I conclude that once a property division is accomplished, the wife will be at least as well off as the husband, particularly in that she has steady employment.

ii) Division of Matrimonial Property

[34] The husband has possession of the matrimonial home - the farm and woodlot. He has retained possession since the wife left. Both husband and wife agree that the house and the five acres that it is situated on is matrimonial property, and both accept that this residential property has a value of \$93,500.00. This figure was established by the MacKay Group Property Appraisers in September of 2007.

[35] I accept this value for purposes of the property division. The husband will pay the wife half the value of that residential property.

[36] Attached to this five acre residential/farm property is a 50 acre woodlot. There is dispute as to both the classification and value of this additional property.

[37] The husband says that this lot is not matrimonial property - that it belongs to him and is not to be shared with the wife. This property was part of the property deeded to the husband by his mother prior to the marriage, as was the residential property.

[38] The evidence is that, as a woodlot, it was cut once and the proceeds used to purchase a truck that was used by the husband.

[39] The husband, in his testimony, referred to the property as “hard times” land, meaning that it was available, if necessary, to address economic need.

[40] A nine acre portion of land across the road from the residential property had been sold during the marriage and the proceeds used to address house maintenance and family needs.

[41] Section 4(1) of the *Matrimonial Property Act* reads:

4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

(a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;

...

(e) business assets;

[42] So I start with the premise that matrimonial assets include all assets acquired by the spouses either before or during the marriage, however, there are exceptions.

It is incumbent upon the party who asserts that the asset is not matrimonial property to show that it falls within an exception.

[43] Section 4(1)(a) excepts “gifts ... received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children”.

[44] Section 4(1)(e) excepts “business assets” as follows:

"business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

[45] I do not conclude that the one time cutting and sale of wood from this property was sufficient to render it a “business asset”. It was not land held for the production of income or profit.

[46] This woodlot property was a deeded gift to the husband from his mother which means that the issue is the extent to which it was used for the benefit of the wife and children - the family.

[47] I conclude that this land was used to the benefit of the family.

[48] The purchase of the truck from proceeds received from the sale of wood off of the land is not definitive, however, I find that the proceeds from the sale of the nine acre property across the road which were used to maintain the family home and pay debts is insightful. Especially when that use is combined with the characterization of the fifty acre lot as “hard times” land by the husband.

[49] This land was available to help this family to address unanticipated needs. Even though it was not used for such purpose, its existence/ownership provided a security benefit that was a positive factor for this family.

[50] I do not find that the husband has brought the fifty acre property within any exception under s. 4(1) of the *Act* and hence will treat this additional property as a matrimonial asset to be divided equally with the wife.

[51] There are two appraisals of this additional property - both agree that it contains fifty acres more or less. One appraises it at \$22,000.00; the other at \$40,000.00. Both used selected comparables. Neither appraiser was produced to support their respective valuations. I conclude that the property is worth \$30,000.00 - half of which will go to the wife.

[52] As a result, the husband will pay to the wife one-half of the value of the matrimonial property:

Residential property: $\frac{1}{2} \times \$93,500.00 =$	\$46,7 50.00
50 acres woodlot property: $\frac{1}{2} \times \$30,000.00 =$	<u>\$15,000.00</u> <u>\$61,750.00</u>

The Debt

[53] The husband took responsibility for the family debt upon separation and wants to have the wife's share "set off" against any payment to the wife. There is a \$9,300.00 debt to Revenue Canada which represents the capital gain and interest deriving from the sale of the nine acre portion. The wife submits that she should have no responsibility for this debt in that money was put aside from the sale of the

property to cover the taxes and this was not looked after by the husband. He replies that he thought that there was no capital gain to be paid because the proceeds were put back into the family's home. Apparently by the time he discovered his mistake, the funds had been used up.

[54] I accept the husband's explanation. The evidence is that the sale proceeds were used to update and maintain the family home and to pay off family debt. I find that the wife should be responsible for half of the tax debt which is \$4,650.00.

[55] Wells Fargo is owed \$2,970.00, which is the money used to purchase the refrigerator that remains in the family home. The wife says the husband, therefore, should be responsible for this loan and I agree.

[56] Each of the parties had a VISA card and I find that each will be responsible for the debt on the card that they carried.

[57] As to the minivan loan, that is the vehicle that the wife took with her on separation and subsequently returned to the husband. The minivan will be sold to address this loan and both the husband and wife will share equally in the responsibility of any deficit.

[58] The wife's total responsibility for debt then is \$4,600.00 being the half-share of the income tax owing and potentially half of the deficit from the sale of the minivan. But before I were to "off set" the wife's family debt responsibility, I consider the reality that the husband has had the benefit of the family home since the wife moved out of that premises in June of 2006.

[59] I conclude that this significant benefit fully addresses any of the wife's debt share to be set off. The wife, therefore, will be entitled to her share of the matrimonial property without any debt set off involved.

Wife's Pension

[60] In the circumstances of the wife not being given spousal support and otherwise considering the circumstances of both of the parties, I do not intend to divide the wife's meager pension.

[61] The wife will retain and maintain medical coverage for the children as long as they remain children of the marriage.

The Bottom Line

[62] There will be no spousal support payable to the wife. The husband will retain all of the matrimonial real estate and will pay to the wife \$61,750.00 as her share therein.

[63] The husband will be responsible for all of the family debt with the exception of the wife's VISA card debt.

[64] The wife's pension will not be divided.

Costs

[65] Each of the parties will be responsible for their own costs.

Chief Justice Kennedy